Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	WC Docket No. 01-338
	)	

REPLY COMMENTS OF THE

UTAH COMMITTEE OF CONSUMER SERVICES

October 19, 2004

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EXECUTIVE SUMMARY

The information submitted in this proceeding demonstrates that competitive local exchange carriers ("CLECs") would be impaired without access to unbundled mass market switching, and, furthermore, that the CLECs' premature loss of access to unbundled network element platform ("UNE-P") would disproportionately harm residential and small business customers by denying them the benefits of choice.

The FCC should reject claims that intermodal alternatives represent economic substitutes for basic landline service and also should reject Qwest's assertion that the existence of commercial agreements "proves" non-impairment. Granular data that consumer advocates such as the Utah Committee of Consumer Services ("Committee") submitted in initial comments unambiguously demonstrates that the application of the FCC's network unbundling network framework to relevant markets yields a clear finding of impairment. Furthermore, contrary to the ill-substantiated claim by incumbent local exchange carriers, the post-*USTA II* "status quo" for those markets for which neither the industry nor state agencies submitted sufficiently granular data is *not* non-impairment. Where granular information *has* been submitted – the data clearly show impairment. Absent any other evidence to the contrary, a logical assumption is that other markets – for which no granular data have yet been provided – are either less competitive than or of comparable structure to those markets for which parties did examine data.

The sweeping generalizations by incumbent local exchange carriers shed no light on whether impairment exists in particular markets. Furthermore, the idea that carriers "could" compete is meaningless for the rigorous and "nuanced" analysis that *United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) requires the FCC to undertake. The Committee urges the FCC to adopt the Committee's recommendations set forth in its initial comments regarding, *inter alia*:

- Specific revisions to the FCC's network unbundling rules (*e.g.*, eliminating the "potential deployment" standard because it is highly subjective; requiring the application of the unbundling framework separately to the residential and business markets; adopting the wire center as the relevant geographic market; and setting 24 DS0 channels as the delineation between the mass and enterprise markets);
- The application of the FCC's network unbundling framework to specific relevant markets in Utah (*i.e.*, based on granular information, reaching a finding of impairment throughout Utah's local markets);
- The importance of ensuring that the FCC's analysis of impairment adequately addresses the unique interests of consumers (*e.g.*, residential consumers depend on UNE-P for competitive choice, and a smooth transition is essential to prevent consumer disruption).

In these reply comments, the Committee demonstrates that the incumbent local exchange carriers' comments do not diminish the importance of any of these objectives nor do they provide granular evidence that would permit findings

other than those that the Committee summarizes in its initial comments and these reply comments.

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REPLY COMMENTS OF THE UTAH COMMITTEE OF CONSUMER SERVICES

INTRODUCTION

The Utah Committee of Consumer Services ("Committee") submits these reply comments in response to comments submitted in the above-captioned proceeding. Qwest Communications International Inc. ("Qwest") and other incumbent local exchange carriers ("ILECs"), in the initial comments they submit in this proceeding, make exaggerated claims of the substitutability of intermodal services for basic landline telecommunications services, misinterpret *USTA II,* and, particularly, in the instance of Qwest, make a misguided assessment of the implications of the existence of a handful of commercial agreements.[1]

[1] The Committee's silence on high capacity and transport should not be construed as agreement with the incumbent local exchange carriers. Indeed,

The regional Bell operating companies ("RBOCs") seek to persuade the Federal Communications Commission ("FCC" or "Commission") that in the post-*USTA II* regulatory environment, the FCC's "default" assumption should be that competitive local exchange carriers ("CLECs") are not impaired without access to unbundled mass market switching. See, for example, Qwest comments at 34, which state:

> Given the requirements of the statute, the Commission cannot proceed from the premise that unbundling will be ordered in all instances except in areas where ILECs demonstrate a lack of impairment. It may order unbundling only in areas where impairment is shown to exist. And as to some network elements, it may be — and in fact is — impossible to find impairment as a matter of law, nationwide.

The Committee strongly disagrees with Qwest's interpretation of the *USTA II* decision expressed in this excerpt from Qwest's comments. Although the Court rejected the FCC's reliance on the status of hot cut processes as a basis for a presumption of national impairment, the Court did not reject the FCC's network unbundling framework. Instead, the Court directed the FCC to reclaim the authority for *applying* the network unbundling framework (rather than, in the Court's view, unlawfully delegating such authority to state regulators).

Pursuant to the Court's findings, the FCC may not rely on the status of ILECs' hot cut processes to presume impairment *but* the FCC must apply its administrative expertise to the careful examination of granular evidence in relevant markets. The ILECs, by contrast, would have the FCC believe that because *USTA II* precludes the states from reaching a finding based on their

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parties have raised numerous and persuasive concerns about unbundling for these critical network elements.

granular assessment, that the need for such an analysis evaporates, which, of course, belies common sense. The ILECs' failure to submit detailed granular data for relevant markets should not be the foundation for a presumption of non-impairment. Furthermore, the fact that such an assessment may pose administrative challenges does not alter the importance of conducting a thorough analysis.

Based on the granular evidence that *has* been submitted in this proceeding (by CLECs and state agencies),[2] clearly, CLECs are impaired without access to unbundled mass market switching, even in the most densely populated and putatively competitive local markets. For those parts of the country where the ILECs *did not* submit granular data the FCC should assume that the structure of these markets is similar to (or less competitive than) those states for which CLECs (e.g., MCI) or unbiased state agencies (e.g., consumer advocates and public utility commissions) *did* submit granular evidence. As the Committee demonstrates in its initial comments and accompanying affidavit of Susan M. Baldwin, the granular evidence for Utah markets demonstrates that CLECs would be impaired in all relevant local markets in Utah without access to unbundled mass market switching. Other filings, which also analyze granular data, reach the same conclusion.

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[2] See, for example, Committee Comments and accompanying Affidavit of Susan M. Baldwin; Comments of the New Jersey Division of the Ratepayer Advocate and accompanying Affidavit of Susan M. Baldwin; New York Department of Public Service comments; Ohio Office of Consumer Counsel comments; and Declaration of Terry L. Murray (MCI). For example, Murray determined, based on her granular analysis of data, that no wire centers in SBC's or Verizon's territory met the FCC-established triggers for mass market unbundled switching. Murray Declaration, at para. 49.

The FCC should reject the ILECs' sweeping assertions about purported non-impairment, and instead rely on the thorough analyses that others have submitted in this proceeding.

COMMERCIAL AGREEMENTS

The existence of commercially negotiated agreements is irrelevant to an assessment of impairment.

According to Qwest, the existence of intercarrier contracts and agreements is evidence of non-impairment. Qwest asserts that:

> Negotiated intercarrier contracts and agreements provide a means for a competing carrier to obtain facilities and capabilities from an ILEC on terms that are commercially reasonable. No carrier can be considered impaired if it can get a needed network element from the ILEC at commercially reasonable rates pursuant to a nondiscriminatory agreement.

Qwest comments at 26. Qwest elaborates further:

> As discussed herein, the rates for particular network elements cannot be construed to create impairment. Nonetheless, to the extent the Commission deems rates relevant, the existence of commercially negotiated agreements demonstrates that carriers have arrived at mutually agreeable rates that permit competitors to offer the services they seek to provide.

Qwest comments at 26, footnote 75.

The fact that Qwest entered into four-year commercial agreements with MCImetro Access Transmission Services ("MCI") and other smaller CLECs for the provision of "QPP" service is an insufficient basis upon which to conclude that there is no impairment. Qwest explains further:

> Qwest will provide the commercial product at prices previously charged for the UNE platform through December 31, 2004. Between January, 2005 and January, 2007, there will be annual incremental rate adjustments.
> …

> Qwest's agreement with MCI was one of the first agreements to be reached between an RBOC and a CLEC addressing mass market switching post-*USTA II* and, to Qwest's knowledge, is the only such commercial agreement regarding the hot cut process. MCI is the second largest UNE-P purchaser in Qwest's region.

Qwest comments, at 56 (footnotes omitted).

Despite Qwest's assertions to the contrary, the existence of commercially negotiated agreements does not "prove" that there is no impairment in Qwest-dominated regions. As MCI observed, "the voluntary nature of an agreement does not in any way mitigate against the risk that an ILEC would seek to engage in discriminatory behavior." MCI comments, at 174. Furthermore, if MCI considered its agreement with Qwest to suffice (*i.e.*, to prove non-impairment in Qwest-served regions), presumably MCI would have expressed this view in its comments. The dissonance between the CLECs' and Qwest's view of impairment[3] suggests that the FCC should not over-extrapolate from these commercially negotiated agreements. Among other things, clearly Qwest, as the incumbent with the ultimate control of critical network elements, and CLECs, as the new entrants that *depend on* access to such network components, do not possess equal "negotiating" power. CLECs could well have sought out some level of stability in their access to unbundled switching, and, in exchange for that stability, "agreed" to Qwest-established rates, terms and conditions. The FCC should not infer from the CLECs' agreement to these arrangements that impairment does not exist.

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[3] See, *e.g.*, comments of the Association for Local Telecommunications Services, and the comments of MCI.

The Committee urges the FCC to reject Qwest's argument that the existence of "negotiated" agreements warrants a finding of non-impairment.

INTERMODAL ALTERNATIVES

The ILECs' use of "lost lines" as evidence of product substitution is flawed.

The ILECs point to declining retail switched access lines to argue that traditional telephone customers are substituting intermodal products for POTS. They state that "[i]ncumbent LECs are now losing large numbers of customer lines – and even greater shares of traffic and revenues – to cable, voice-over-IP, and wireless providers." *UNE Fact Report 2004,* I-4.[4] However, many factors contribute to the declining demand for telephone lines (the economic downturn, for instance) and the ILECs have certainly failed to show that the entire decrease in demand has been due to a shift in consumer preference for non-POTS products (*i.e.*, intermodal alternatives).

The ILECs have not explained whether the decline in demand for lines is for primary or additional lines. The Commission should be wary of determining that consumers are substituting intermodal products for their primary landlines. Demand trends indicate that mass-market consumers are substituting wireless, broadband and VoIP products as a substitute for *additional* lines.

Between 2001 and 2002, the quantity of households that have telephone service that subscribe to additional lines declined by 6.4 million. The percentage

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[4] BellSouth Corporation ("BellSouth"), SBC Communications Inc. ("SBC"), Qwest Communications International Inc. ("Qwest"), and the Verizon telephone companies ("Verizon") sponsored the "UNE Fact Report 2004." Letter from Evan T. Leo to Marlene H. Dortch, October 4, 2004 ("UNE Fact Report"). The United States Telecom Association, BellSouth, Qwest, SBC, and Verizon also each individually submitted comments in this proceeding.

of households with telephone service that subscribe to additional lines declined from 24.6 percent to 18.0 percent.[5] More recent data from the FCC's *Statistics of Common Carriers* indicate that Qwest's "line loss" is overwhelmingly in the additional line category. The number of additional lines served by Qwest declined 19 percent between December 2002 and December 2003, while Qwest's primary line subscribership dropped by just 6 percent.[6]

ILECs fail to analyze separately consumers' demand for *primary* and *additional lines.* Customers' preference for wireless, broadband, and/or VoIP in lieu of an *additional* wireline does not provide evidence that intermodal alternatives are economic substitutes for the primary line.

Qwest urges the FCC to rely on the emergence of intermodal providers in support of a finding of non-impairment. Qwest comments at 19.[7] The Court's guidance to the FCC in this regard is as follows:

> As for the ILECs' claim that the Commission's impairment standard unlawfully excludes consideration of intermodal alternatives, we observe that the Commission expressly stated that such alternatives are to be considered when evaluating impairment. Order ¶ ¶ 97–98, 443. Whether the weight the FCC assigns to this factor is reasonable in a given context is a question that we need not decide, except insofar as we reaffirm *USTA I*'s holding that the

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[5] *Trends in Telephone Service*, Industry Analysis and Technology Division, Wireline Competition Bureau, May 2004, Table 7-4.

[6] *Statistics of Communications Common Carriers*, Industry Analysis and Technology Division, Wireline Competition Bureau, Table 2.6.

[7] USTA similarly argues that "[t]he FCC cannot disregard the D.C. Circuit's emphatic finding that, in many markets around the country, intermodal competitors such as wireless, cable telephony and VoIP providers can and currently do compete without mass-market switching." USTA comments at 7-8.

> Commission cannot ignore intermodal alternatives. *USTA II,* 290 F.3d at 429.

Such a consideration is appropriate not only to comply with the Court's directives but also to support thorough economic analysis of the local telecommunications market structure. Intermodal alternatives exhibit some cross-elasticity with *additional* lines, but, for the vast majority of consumers, do not represent an economic substitute for basic primary lines. Consumers' declining demand for additional lines is fully consistent with the cross-elasticity of alternative technologies with consumers' demand for *supplemental* services. In considering substitution possibilities, one economist states:

> The ideal definition of a market must take into account substitution possibilities in both consumption and production. On the demand side, firms are competitors or rivals if the products they offer are good substitutes for one another in the eyes of buyers. But how, exactly, does one draw the line between 'good' and 'not good enough' substitutes.[8]

The ILECs do not justify their reliance on intermodal service as a "good enough" substitute for landline service. Consumers know better than ILECs whether wireless and VoIP represent "good" substitutes for basic telecommunications service and express this preference through their actual purchasing decisions.

Contrary to Verizon's assertion that "wireless service is competitive with wireline service in price, quality, and functionality,"[9] wireless service is not a substitute for landline service. Elderly consumers have expressed "complaints

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[8] *Industrial Market Structure and Economic Performance*, F. M. Scherer (Chicago: Rand McNally & Company 1970), at 53.

[9] Verizon comments, at 101.

about incomprehensible service contracts, confusing bills and dead zones that are not clearly marked on coverage maps." As further explained, these complaints "are the same concerns that have been expressed for years by other consumer advocates." Furthermore, only 39 percent of people 65 and older use wireless service.[10] As the Association for Local Telecommunications Services ("ALTS") explains:

> CMRS does not constitute a substitute for traditional wireline voice service. Indeed, SBC/Bellsouth-owned Cingular and AT&T, in their recent merger application, made clear that they believe wireless and wireline networks are not substitutes.

ALTS Comments at 40. ALTS provides further elaboration:

> *See,* AT&T Wireless Corporation and Cingular Wireless Corporation Joint Application for Transfer of Control of Licenses and Authorizations, WT Dkt. No. 04-70, Declaration of Richard Gilbert, ¶ 44 (filed Mar. 18, 2004) ("Customer substitution from wireless to wireline would not be sufficient to make unprofitable a small but significant non-transitory price increase by a hypothetical monopoly supplier of mobile wireless voice services. At the present time, wireline service is sufficiently differentiated from wireless service to exclude wireline from the relevant product market").

ALTS Comments, footnote 48. ALTS also observes that "Verizon has described the numbers of customers porting from wireline to wireless as 'very, very small' and 'insignificant.'" ALTS Comments at 40, *citing* Press Release, Verizon, 2003 Verizon Earnings Conference Call and Investor Conference, Jan. 29, 2004, available at investor.verizon.com/news (conference presentation materials only).

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[10] "Cellphone Industry Hits Snag As It Woos Untapped Market," *New York Times*, October 11, 2004, A-1.

As ALTS observes, the FCC's data corroborate Verizon's assessment of consumers' negligible interest in porting their landline number to their wireless service. ALTS states that "in April 2004, only 49,000 of 1,381,000 or 3.5% of the numbers ported to new carriers were from wireline to wireless. ALTS comments at 40, *citing* Wireless Telecommunications Bureau, Wireline Competition Bureau and Consumer & Governmental Affairs Bureau, Number Portability: Implementation and Progress, at 5 (rel. May 13, 2004).

The ILECs' comments fail to recognize that consumers prefer to be able to reliably reach emergency assistance to care for young children, the elderly, or other household members. The ILECs' filings neglect to address this important consumer preference. Society has invested in state-of-the-art emergency response systems, which, in turn, provides compelling evidence of the utility (or value) that consumers ascribe to E911. That a tiny percentage of the population may choose to abandon wireline entirely does not alter the fact that the vast majority of households and small businesses place a high value on the public safety characteristics of landline telephone service.[11] The preferences of a minority certainly do not constitute evidence that intermodal technology offers an

[11] As reported recently, "Internet-based phone services, including Vonage and AT&T Corp's CallVantage, are most economical for people who get their Internet connection from a cable company and are willing to disconnect their conventional phone line, a move many consumers still view as risky since the service is in its infancy. Internet phone service won't work if the power or Internet service goes out. And many Internet-based services don't connect to 911 the same way conventional phone lines do." "All in One," *The Wall Street Journal*, September 13, 2004, Page R6.

economic substitute for the majority of consumers who continue to rely on traditional landline service.

RELEVANT MARKETS

Qwest has not directly replied to the FCC's request for comments as outlined in its NPRM with respect to relevant markets. However, Qwest's comments suggest that it supports a nationwide market, something *USTA II* clearly prohibits. For example, Qwest asserts that "switching is not geographically limited. Thus, any differences in the availability of alternative sources of this network element in particular geographic locations become irrelevant, as competitors can, and frequently do, utilize distant switches to process traffic. Absent meaningful distinctions between geographic areas, the Commission may render its determination on a nationwide basis consistent with *USTA I* and *USTA II*."[12] Qwest's statement is overly broad and unsupported. Qwest, and the ILECs more generally, have erroneously placed substantial weight on the purported capabilities of CLECs to serve the mass market with their own switches.

As stated in the Committee's initial comments, the FCC should not rely on analyses of potential deployment in its determination of impairment.[13] The ILECs' reliance on such broad statements as the following offers the FCC little in the weigh of granular evidence: "Because of the large number of switches

[12] Qwest comments, at 42.

[13] Committee comments, at 14 - 16; Baldwin Utah Affidavit ¶¶ 128 – 132.

deployed by competitors in local markets there simply is no rational basis upon which the FCC can require ILEC unbundling of switching."[14] USTA also asserts:

> Further, because there is extensive competition for mass market switching, the facts do not support the continued use of the UNE Platform ("UNE-P"). The continued use of the UNE-P is no longer necessary given that there are over 10,000 competitive circuit and packet voice switches deployed in both small and large markets. No reasonable argument can be made that CLECs would be impaired by the removal of mass-market switching from the list of UNEs. Failure to remove mass-market switching and eliminate UNE-P would be legally unsustainable and critically impact facilities-based providers that offer local services. The ill-conceived use of UNE-P has contributed only to synthetic competition and should be ended.[15]

In an attempt to justify its support for a national finding of non-impairment, Qwest argues that: "only one factor served as the basis for the Commission's decision to decline to adopt an unqualified national finding of 'no impairment' for mass market switching – the operational barriers associated with the hot cut process."[16] Qwest further asserts that hot cut processes have been "effectively addressed" in state proceedings and that hot cut processes no longer pose as a barrier to CLECs and therefore, there is no longer any need for unbundling under Section 251.[17]

Qwest's characterization of the FCC's findings in the *TRO* and the Court's ruling is problematic. The *TRO* and *USTA II* provide support for the Committee's position that impairment must be analyzed on a more granular basis. The FCC's

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[14] USTA comments, at 12.

[15] USTA comments, at 13.

[16] Qwest comments, at 49.

[17] Qwest comments, at 49.

provisional national finding of impairment was based on hot cuts and on the assumption that state commissions would then analyze markets in a more nuanced manner. In *USTA II*, the Court notes that the "Commission cannot proceed by very broad national categories where there is evidence that markets vary decisively" thus undermining the ILECs' overly broad arguments. Although Qwest submitted market data at the wire center level in Utah, it did not submit this type of granular evidence to the FCC in this proceeding. However, as demonstrated in the Committee's initial comments and the Affidavit of Susan M. Baldwin, the evidence shows that CLECs do not use self-provisioning switches to serve customers in numerous wire centers within MSAs that Qwest originally proposed as "non-impairment" areas, and that the overwhelming majority of competition that does exist relies on UNE-P.[18] Data submitted by other parties similarly demonstrates that CLECs are not serving customers *throughout* MSAs with UNE loops. See, *e.g.*, Affidavit of Pamela A. Tipton (BellSouth), Exhibit PAT-15; New Jersey Division of the Ratepayer Advocate Comments, Table 3 and Confidential Attachments to the Affidavit of Susan M. Baldwin on behalf of the New Jersey Division of the Ratepayer Advocate, SMB-13, SMB-14, and SMB-15.

The FCC should clearly define relevant markets before it undertakes its impairment analysis.

The ILECs fail to address the FCC's request for comments on "how best to define relevant markets (e.g., product markets, geographic markets, customer

[18] Committee comments, Baldwin Affidavit, confidential attachments.

classes) to develop rules that account for market variability and to conduct the service-specific inquiries to which *USTA II* refers."[19] Despite the fact that the D.C. Circuit Court of Appeals found in *USTA II* that "the FCC is obligated to establish unbundling criteria that are at least aimed at tracking relevant market characteristics and capturing significant variation," the ILECs' filings contain overly broad statements and assertions regarding impairment on a national basis and fail to acknowledge evidence demonstrating the existence of market variations. Furthermore, the ILECs' few statements with regard to market definition refer almost entirely to intermodal competition.[20] The Committee reiterates its recommendation that the FCC define markets correctly in order to assess whether impairment exists.[21] As MCI similarly states, the Commission should define markets before it undertakes its impairment analysis.[22]

The Commission should establish the cross over point between the mass market and enterprise market to correspond with 24 DSO channels (i.e. the cross over point between DS0 and DS1 provisioned lines).[23] While, from a theoretical stand point, relying on the "economic" cross over point for delineating between the mass and enterprise markets makes sense, such a determination relies on numerous variables (including, for example, DSO and DS1 rates, DS1 multiplexing equipment costs, etc.), which, in turn, are subject to change. However, the distinction between DS0 lines and DS1 lines, while important, is not

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[19] *NPRM*, at ¶ 9.

[20] See Committee discussion above.

[21] Committee comments, at 7.

[22] MCI comments, at 21.

[23] Committee comments, at 8; Baldwin Aff., at ¶ 32.

necessarily indicative of whether the customer being served is an enterprise or mass-market customer. The Commission should note that comments in this proceeding have shown that evidence presented in some state TRO proceedings often overstated mass-market lines served by competitors. In some cases, the incidental use of DS0 lines by enterprise customers (*e.g.,* a line for a facsimile machine) was incorrectly identified as competition for mass-market lines by the ILEC.[24] In a summary of the record evidence for the Pennsylvania Public Utility Commission, the administrative law judge in Pennsylvania noted that Verizon apparently counted large numbers of lines in the Harrisburg MSA as mass market even though these were Adelphia lines provided to the Commonwealth of Pennsylvania under a contract to provide telephone and data networks to various government offices and schools (clearly an enterprise customer).[25] The Commission should carefully analyze data submitted in this proceeding to ensure that its conclusions regarding impairment in particular markets are not based on erroneous data.

The comments in this proceeding provide support for the Committee's position that the FCC should establish the wire center as the relevant geographic market.

The RBOCs' position with respect to the geographic market over which to apply the FCC's unbundling rules is vague and unsupported by the comments and evidence submitted in this proceeding. Verizon, for example, claims that MSAs might even be too small an area over which to analyze impairment and that carriers compete over even larger areas:

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[24] Murray Declaration (MCI), at ¶¶ 29-30.

[25] Pennsylvania Office of the Consumer Advocate comments, Appendix A, at 10.

> As shown in detail below, when competitors seek to provide mass-market voice service or high-capacity services, they enter broad geographic markets. Although they (rationally) target the most lucrative customers in those markets, the markets in which they compete cannot reasonably be defined as limited to individual loop or transport routes, or to individual wire centers. Instead, as demonstrated on the maps that Verizon submits, they compete throughout a broad geographic market, normally an area the size of a Metropolitan Statistical Area ("MSA") and often a larger area, and in some cases competing providers have entered nationwide.[26]

The RBOCs' position that geographic markets should be defined by even larger geographic areas than the MSA seems to rely solely on their claim that wireless, VOIP, and even cable providers compete on a national basis, and to a lesser extent, the fact that switches have the capability to serve wide geographic areas.[27] Alfred E. Kahn and Timothy J. Tardiff recommend that the FCC assess impairment for mass market switching on a "national scope" just as the FCC evaluates long-distance services.[28] However, for the reasons discussed above, intermodal competition is insufficient for a finding of impairment.

As stated in its initial comments, the Committee recommends that the Commission define the relevant geographic market to which it will apply its unbundling framework as the wire center.[29] This definition best reflects how CLECs actually serve customers. Many parties to this proceeding, including the Utah Public Service Commission and Utah Division of Public Utilities, support the use of the wire center as the relevant geographic market.[30] As stated in the

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[26] Verizon comments, at 25.

[27] See, for example, Verizon comments, at 27; Qwest comments, at 54.

[28] Kahn/Tardiff Declaration (Verizon), at ¶ 16.

[29] Committee comments, at 9.

[30] See, for example, Pelcovits Declaration (MCI), at para. 43; MCI, at 8; New Mexico Attorney General comments, at 2; Cooper Statement (Texas

Baldwin Affidavit: "The wire center is logical, corresponds with the economics of the supply and the demand for retail and wholesale services, is administratively feasible, and recognizes disparate customer densities. By contrast, Qwest's proposed geographic market definition in the Commission-mandated state proceeding, and that of other ILECs, is artificial and encompasses wire centers with differing structural attributes."[31]

Other comments in this proceeding support the Committee's recommendation and Ms. Baldwin's statement that "much of the germane information about local market structure is based on the ILECs' wire centers."[32] Comments highlight the fact that carriers already have access to data on a wire center basis;[33] operational issues are determined on a wire center basis (e.g., hot cuts, deployment of IDLC loops);[34] wire centers are used as the basis for the ILECs' filings for pricing flexibility and benchmarks for state reports, collocation, universal service and tariff filings;[35] and data the ILECs presented in the state TRO proceedings were collected at the wire center level.[36] The Utah Public Service Commission concludes: "The wire center is the natural administrative unit for which most of the telecommunications data is collected and analyzed and, most importantly, best indicates where CLECs are actually serving

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PUCO/CFA), at 18; NASUCA comments, at 20; Utah Public Service Commission comments, at 2; Utah Division of Public Utilities comments, at 6.

[31] Baldwin Utah Affidavit, at ¶ 39.

[32] Baldwin Utah Affidavit, at ¶ 40.

[33] New Mexico Attorney General comments, at 2.

[34] New Mexico Attorney General comments, at 2; MCI comments, at 8.

[35] Utah Public Service Commission comments, at 2; Utah Division of Public Utilities comments, at 6.

[36] See, for example, Murray Declaration (MCI), at para. 47.

customers. Conversely, data for MSAs, if collected and analyzed, is simply data collect by wire center and then aggregated."[37]

The goal of this proceeding is not to protect particular carriers or particular modes of entry but rather to ensure that competitive options exist for *customers.* Markets should not be defined so broadly as to encompass wire centers in which CLECs may not actually be serving customers. Competition in adjacent wire centers is irrelevant for the customer in a wire center with no competitive options. As noted by Dr. Pelcovits on behalf of MCI: "the location specificity of the delivery of services is one of the unique characteristics of markets for telecommunications services, and it is crucial to the task of defining markets . . ." By the ILECs' own admissions, a CLEC may never find a particular customer's wire center profitable to enter.[38]

One approach, which responds to the FCC's admonishment to states to "not define the market so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market,"[39] is the clustering of contiguous wire centers that exhibit similar market characteristics. Numerous comments agree that the Commission could cluster similar wire centers for purposes of analyzing impairment for mass market switching.[40] However, given the time constraints

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[37] Utah Public Service Commission comments, at 2.

[38] See, for example, *In the Matter of a Proceeding to Address Actions Necessary to Respond to the Federal Communications Commission Triennial Review Order Released August 21, 2003*, Utah Public Service Commission Docket No. 03-999-04, Direct testimony of William Fitzsimmons on behalf of Qwest Corporation, January 13, 2004, at 53-54.

[39] *TRO*, ¶ 495.

[40] NASUCA comments, at 20; New Mexico Attorney General comments, at 2; Cooper Statement (Texas OPUC/CFA), at 18.

that the Commission has placed on this proceeding, the Committee does not believe that the FCC will be able to cluster wire centers accurately and in a timely manner in advance of its assessment of impairment. The Commission should define the wire center as the relevant geographic market, rather than the MSA, as proposed by the ILECs. In any case, whether the Commission ultimately defines the relevant geographic market as the wire center or as clusters of homogenous wire centers, the Commission should first require ILECs to submit data at the wire center level.

Many non-RBOC commenters agree that the FCC should not adopt the RBOC-proposed MSAs as the relevant geographic market.[41] For instance, the Utah Division of Public Utilities ("Division") submits that the MSA "is not a telecommunications construct, and the geographic area bears no relation to telecommunications technologies."[42] Furthermore, the Division correctly observes that the MSA is not sufficiently granular and fails to capture significant variations in the level of competition within a given MSA. Finally, it is NASUCA's position that "[c]onditions within the MSAs are far too diverse to make the MSA a single market for judging impairment."[43]

In its comments, Qwest states that "carriers can utilize switches anywhere within the U.S. to switch traffic, regardless of particular rate center, LATA, or state boundaries."[44] The fact that switching equipment is physically able to serve broad geographic areas does not mean that the economies of scale and scope

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[41] See, for example, NASUCA comments, at 20; New Mexico Attorney General comments, at 2.

[42] Utah Division of Public Utilities comments, at 7.

[43] NASUCA comments, at 20.

[44] Qwest comments, at 54.

justify *actually* serving customers in the broader area. It is critical for the FCC to examine where customers are *actually* being served. CLECs may be able to recover the associated additional collocation and transport costs of serving a large geographic area over only a very small number of customers, thus not justifying the additional expense of geographic expansion. The ILECs admit as much in their comments. For instance, Verizon acknowledges that CLECs will target only the most lucrative customers[45] and, in Utah's state proceeding, Qwest acknowledged that there might be wire centers that are not profitable to serve.[46] In its *Triennial Review Order*, the FCC concludes that "if competitors with their own switches are only serving certain geographic areas, the state commission should consider establishing those areas to constitute separate markets."[47]

The Commission should consider whether CLECs are serving both residential and business consumers in the relevant geographic market.

A broad consensus exists among commenters in this proceeding concerning the need for CLECs to serve both residential *and* business customers to be considered to be serving the entire mass market.[48] The FCC ordered in the *TRO*, that, "[i]n circumstances where switch providers (or the resellers that rely

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[45] Verizon comments, at 25.

[46] See, for example, *In the Matter of a Proceeding to Address Actions Necessary to Respond to the Federal Communications Commission Triennial Review Order Released August 21, 2003*, Utah Public Service Commission Docket No. 03-999-04, Direct testimony of William Fitzsimmons on behalf of Qwest Corporation, January 13, 2004, at 53-54.

[47] *TRO*, ¶ 496, footnote 1537.

[48] See, for example, Ohio Office of Consumer Counsel comments, at 3; NASUCA comments, at 8; Pennsylvania Office of Consumer Advocate comments, at 15; Murray Declaration (MCI), at ¶ 36.

on them) are identified as currently serving, or capable of serving, only part of the market, the state commission may choose to consider defining that portion of the market as a separate market for purposes of its analysis."[49] The Commission distinguished among three classes of customers in the *TRO*:

> Based on the record before us, it is reasonable to distinguish these three classes of customers – mass market, small and medium enterprise, and large enterprise – for several reasons. These classes can differ significantly based on the services purchased, the costs of providing services, and the revenues generated. Because of these differences, for certain network elements the determination whether impairment exists may differ depending upon the customer class a competing carrier seeks to serve.[50]

USTA II does not invalidate the Commission's analysis in the TRO regarding the distinctions in customer class within the mass market. In its comments, NASUCA urges the Commission to analyze the residential market on a "standalone basis," and concludes that the Court's guidance requires such a distinction:

> The D.C. Circuit found fault with the Commission's impairment standard, and with the delegation of decision-making authority to the states. In USTA I, the D.C. Circuit required the Commission to analyze impairment on a granular basis. The Commission should, therefore, perform a granular analysis following an impairment standard that addresses the concerns of the D.C. Circuit. That would include dividing the mass market into its two customer class components, residential and small business service."[51]

As demonstrated in the Committee's initial comments and the Affidavit of Ms. Baldwin, the residential market is clearly a distinct customer class within the

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[49] *TRO*, footnote 1552.

[50] *TRO*, ¶ 124.

[51] NASUCA comments, at 8.

mass market.[52] ILECs charge different rates for residential and business local exchange service; the ability to price discriminate is evidence of separate markets. Other comments in this proceeding also support the need to examine these markets separately.

Qwest asserts that the nationwide deployment of switches demonstrates that "alternatives to ILEC mass market switching exist" and further, that "carriers may use the same switch to serve both enterprise and mass market customers."[53] Qwest does not demonstrate that the switches are currently serving even the small business segment of the mass market. However, even if that was the case, the fact that a CLEC has deployed a switch that serves a sub-market, *e.g.*, only small business customers, does not indicate that it will expand its offerings to serve residential customers.

An impairment analysis should focus on whether CLECs are *actually* serving customers, not whether they have the potential to do so. CLECs that are physically able to serve residential customers in a wire center where they have already deployed a switch have chosen to serve only the business market. Financial reasons motivate these entry decisions. "Despite the fact that MCI has local switches in place all over the United States, and that it has been a pioneer in developing mass market offerings, MCI has not been able to use its switches to serve residential customers."[54]

The RBOCs have failed in this proceeding, and in the state TRO proceedings, to provide evidence of the competitive options available to residential versus small business customers within the mass market. Evaluating

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[52] Committee comments, at 10-11; Baldwin Utah, at paras. 51 – 53.

[53] Qwest comments, at 47.

[54] MCI comments, at 11.

aggregate data (data for residence and small business together) masks the lack of competition that exists for residential customers. The Ohio Office of Consumer Counsel asserts that the record developed in Ohio appears to do just that.[55] The Administrative Law Judge in Pennsylvania found that "[t]he biggest single problem with Verizon's compilation is that it does not separate residential from small business lines . . . Thus it is impossible to determine from Verizon's compilation those lines that serve residential customers."[56]

NASUCA asserts that "[t]he existence of competition for small business customers has virtually no impact on the choices available to residential customers, if the CLECs providing the small business service do not also offer competitive options for residential customers. A finding of no impairment for residential customers based on competition for small business customers defies logic and contradicts the intent of the 1996 Act."[57] The evidence confirms this statement. For instance, the New York Department of Public Service found that "[t]he result of including the small business market (18 lines or less) in the definition of mass market is that 162 of 520 Verizon New York Wire Centers meet the trigger test and if only residential service (4 lines or less) is considered, then 19 wire centers meet the test."[58]

APPLYING THE FCC'S UNBUNDLING NETWORK TO MAKE DETERMINATIONS ON ACCESS TO INDIVIDUAL NETWORK ELEMENTS

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[55] Ohio Office of Consumer Counsel comments, at 3.

[56] Pennsylvania Office of Consumer Advocate comments, Appendix A, at 9.

[57] NASUCA comments, at 17.

[58] New York Department of Public Service Comments, at 3, 17. The Committee does not support the New York Department's distinctions with respect to line counts but believes its findings are telling, nonetheless.

A review of the granular data presented in Utah's impairment proceeding indicates that the FCC cannot make a finding of non-impairment for any markets – no matter how such markets are defined – in Utah.

As Ms. Baldwin's Affidavit demonstrates: "[r]esidential and small business customers' access to competitive choice depends critically on the availability of UNE-P." Baldwin Aff., ¶ 55, and confidential attachments to Baldwin Affidavit. The evidence in Utah's impairment proceeding demonstrates that CLEC activity is scattered within Qwest's proposed markets, and indeed absent in many parts of the Qwest-proposed geographic boundaries. Baldwin Aff., ¶ 57 and confidential attachments to Baldwin Affidavit.

The Commission should adopt the self-provisioning triggers originally adopted in the Triennial Review Order.

The FCC seeks comments on how to apply its unbundling framework "to make determinations on access to individual network elements." *NPRM*, ¶ 11. The FCC's framework for the determination of access to unbundled network elements is made up of two "triggers" and a "potential deployment" analysis for evaluating whether impairment exists in a given market. *TRO*, ¶ 494. Based on the Committee's review of others' initial comments in this proceeding, and the analysis in the Committee's initial comments, the Committee recommends that the FCC adopt impairment standards that are largely similar to the ones it established in the *TRO* (with the modifications described in detail in the Committee's initial comments), rely on states for fact-finding, and apply its standards to these facts. See, *e.g.*, NASUCA comments, at 8. NASUCA urges the Commission to adopt the two triggers outlined in the *TRO* as its own triggers

and to use those triggers separately, when determining impairment in the residential and business markets. NASUCA comments, at 23.

Others' initial comments do not address the concerns that the Committee raised about the FCC's "potential deployment" analysis.

In its comments, MCI attempts to address the Court's question regarding "economic entry by whom?" MCI states that the test with respect to economic entry should focus on market performance, and should address whether the CLEC that enters a market creates meaningful competition. MCI comments, at 23. According to MCI, actual market performance leads to consumer welfare, and rather than focusing on individual competitors the analysis should address market structure. MCI, at 24. However, MCI's definition of the representative CLEC raises problems similar to those identified by the Committee. MCI states that the CLEC should posses neither "atypical advantages" nor "atypical disadvantages." MCI at 24. Instead, the Commission should focus on whether entry is possible for "representative competitive LECs." MCI, at 25. Although MCI's proposed analysis is theoretically appealing, it is sufficiently vague and subjective as to lead to widely divergent results, similar to those that the industry submitted and the Committee analyzed in Utah's *TRO* proceeding. Committee comments at 14 - 16; Baldwin Aff., at ¶¶ 145 - 173.

NASUCA also recognizes that *USTA II* questions the use of the potential deployment analysis but states that the standard to be used is whether entry is economic for the hypothetical CLEC that uses the most efficient telecommunications technology available (i.e. the TELRIC standard) and

NASUCA asserts that such a standard would be upheld on appeal. NASUCA comments, at 24-25. (See, also NASUCA's support for economic entry test at page 53.)

As the Committee demonstrated in its initial comments, the FCC should either eliminate this highly subjective standard from its final network unbundling rules or afford it minimal weight.[59]

TRANSITION FROM UNE PLATFORM

The Commission should seek to minimize disruption to consumers in the transition from UNE-P to UNE-L.

The Committee restates its position that the second phase of the transition outlined by the Commission will not apply to markets in Utah because the evidence shows that CLECs are still impaired without access to unbundled switching to serve mass-market customers.[60] The Committee nonetheless joins a substantial number of commenters in urging the Commission to eliminate this second phase of the transition.[61] The current rules subvert the states' ratemaking authority, have not been shown to be based on any objective pricing method, and fail to protect the interest of consumers. The New Jersey Board of Public Utilities argues that the price increases ordered by the FCC "are not only unjustified, they are not based on any cost methodology, let along TELRIC, and are illegal."[62] NARUC asserts that "there is *no* provision in the Act that allow the

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[59] Committee comments at 14-16; Baldwin Affidavit at paras. 128 – 132, 172 – 176.

[60] Committee comments, at 17.

[61] See, for example, New Jersey Board of Public Utilities comments, at 12; NARUC comments, at 3.

[62] New Jersey Board of Public Utilities comments, at 12.

FCC to usurp final State-pricing authority"[63] and that the "FCC's proposal to raise rates uniformly after six months is – on it face – arbitrary and capricious . . . The FCC nowhere provides any rationale to justify the amount of the increase."[64]

Contrary to USTA's suggestion that the "Commission should create new rules that are effective immediately" and "must affirmatively move forward and meet the Chairman's deadline without unnecessary transitional rules,"[65] it is imperative that the Commission manage the transition from UNE-P if and when CLECs are unimpaired without access to unbundled switching to serve the mass market in individual markets identified by the Commission. As noted in the Committee's comments, and supported by MCI's comments, if and when the transition from UNE-P is appropriate, the FCC should instead rely upon the transition mechanisms it outlined in the *Triennial Review Order*.[66] The transition plan must encompass more than simply the rates, terms and conditions under which unbundled network elements are supplied and should seek to minimize consumer disruption. Despite assertions to the contrary, it is not yet evident that the ILECs have efficient and cost-effective hot cut processes in place to handle such a transition.[67]

INFRASTRUCTURE INVESTMENT

UNE-P does not discourage economically efficient investment.

Qwest contends that "[m]aintaining a requirement for unbundled access to

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[63] NARUC comments, at 3, emphasis in original.

[64] NARUC comments, at footnote 3.

[65] USTA comments, at 3, 25.

[66] Committee comments, at 17; MCI comments at 121. MCI agrees that the transition outlined in the TRO is workable with a few adjustments.

[67] Qwest comments, at 49.

mass market switching would undercut this goal [infrastructure investment] because of the adverse affect on CLEC and ILEC investment caused by the imposition of below-cost TELRIC rates." Qwest Comments, at 60. Qwest's argument in this regard is unpersuasive. It is in society's interest to set pricing signals to encourage investment where such investment is economically efficient and to discourage the replication of economically inefficient infrastructure investment. Uneconomic investment is not in society's interest because it is wasteful of resources. Committee Comments, Baldwin Affidavit, at para. 19.

Furthermore, the emerging popularity of alternative technologies has been occurring *at the same time* as CLECs have used UNE-P to enter new markets and to serve residential and small business customers. This pattern contradicts the ILECs' assertion that UNE-P stifles innovation and investment. As cited in the Baldwin Affidavit, a recent study shows that "states that have established relatively lower rates for unbundled loop access have enjoyed *more* consumer choice and have seen *more* deployment of broadband technology within their borders." Baldwin Aff. at para. 19, citing "The Positive Effects of Unbundling on Broadband Deployment," Phoenix Center Policy Paper No. 19, George S. Ford and Lawrence J. Spiwak, Phoenix Center Policy Center, September 2004, at 12 (emphasis in original).

If there are particular geographic, product, or class markets for which it would be inefficient to duplicate resources, society should not seek to stimulate uneconomic investment by closing the door on UNE-P. The Committee urges the Commission to seek a balanced goal of encouraging the economic use of

UNE-P in concert with facilities-based entry. By combining facilities-based and UNE-P, CLECs are more likely to be able to establish a presence; recover advertising, personnel, customer service and other expenses; and then gradually replace UNE-P, where it is efficient to do so, with facilities-based competition. But as the empirical evidence clearly demonstrates, not all markets may lend themselves to facilities-based competition. See, *e.g.*, Committee Comments, Baldwin Affidavit, confidential attachments.

CONCLUSION

In conclusion, the Committee recommends, *inter alia*, that the Commission fine-tune the network unbundling framework that it set forth approximately fourteen months ago in its *TRO*, clarify its market definitions consistent with the recommendations set forth in the Committee's initial and these reply comments, and apply the modified network unbundling rules to granular evidence. The Committee urges the Commission to reach a finding of impairment throughout Utah's local markets based on the granular information that the Committee submitted in its initial comments and accompanying affidavit.

The Committee urges the Commission to reject the ILECs' unpersuasive claim that the presence of intermodal alternatives and commercial contracts is evidence of non-impairment. Also the Committee urges the Commission to reject the ILECs' faulty premise that because a CLEC "could" enter a market, it will do so. By maintaining its focus on the consumer and whether residential *and* business consumers are actually served by self-provisioning CLECs, the FCC can assure that the goals of the Telecommunications Act of 1996 are fulfilled.

The detailed analysis of granular information provided by the Committee and others in this proceeding demonstrate that UNE-P continues to be essential for mass-market consumers' competitive choice.

Respectfully submitted,
UTAH COMMITTEE OF CONSUMER SERVICES
/s/ Paul H. Proctor
by Paul H. Proctor
Assistant Attorney General for
Utah Committee of Consumer Services
Box 146782
Salt Lake City, Utah 84114
(801) 366-0552

Economic Consultant
Susan M. Baldwin
17 Arlington Street
Newburyport, MA 01950
(617)388-4068